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The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union

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Theories on the role of norms in international relations generally neglect the possibility that after their adoption a new battle over their precise meaning ensues, especially when a norm remains vague and illusive. Norm implementation is not only a matter of internalization and compliance, but also of redefinition. Building on insights from rationalist and constructivist approaches, this article advances the idea of recurrent battles for and over norms in international politics. It argues that the analytical tools of international regime theory are instrumental in tracking such battles. This framework is applied to the history and role of subsidiarity as a norm in the competence regime of the European Union between 1991 and 2005. Its main finding is that the issue of subsidiarity was not a matter of norm internalization, but concerned a recurrent battle between old and newly empowered actors over its precise meaning, eventually favouring the member states' prerogative.

KEY WORDS ♦ constructivism ♦ European Union ♦ international norms ♦ international regime theory ♦ subsidiarity

Introduction

The evolution of subsidiarity in the European Union (EU) poses a puzzle for International Relations (IR) theories on the role of norms in international politics. On the one hand, its adoption at the 1990 Maastricht summit seemed a clear indication of the acceptance of an international norm that structured the distribution of competences between the supranational

European institutions, notably the European Commission, and the member states. The norm stated that decisions should be taken at a level as low as possible. The collateral concept of proportionality added that the EU should act only to the extent that is needed to accomplish its objectives and no further. Since the adoption of subsidiarity, however, its application has produced further skirmishes between various actors in the EU polity, including the Commission, the member states, the regions, and the European Court of Justice (ECJ), resulting in a renewed battle for the precise contents of the norm. This battle was first extended to include a new norm, the so-called Open Method of Coordination (OMC), and has entered its latest stage during the European Convention, which produced a European Constitutional treaty, in which subsidiarity has become a weapon in the hands of national parliaments. As a matter of fact, the failure of the ratification of this treaty during the spring of 2005 has heartened some proponents of subsidiarity. They claim that now only subsidiarity might save Europe from institutional deadlock (e.g. Cooper, 2005).

These developments underscore a problem in many IR theories of international norms. These theories tend to focus on the adoption and impact of international norms, but often assume that a norm, once adopted, retains its original meaning. This especially concerns theories that attempt to account for permanent changes in actors' preferences (or even identities) in terms of international norms. For instance, Finnemore and Sikkink (1998: 892–3) argue that 'agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread ...'. Similarly, Klotz (1995: 23–5) discusses various causes of norm change, but then argues that the crucial question is how norms become institutionalized. She does not raise the possibility that international norms, once adopted, are themselves subject to new battles over their meaning and usefulness. Such battles can be expected to occur in classical intergovernmental arrangements: the reinforcement of a norm here is difficult because of the relative lack of legal enforcement mechanisms. One would expect norm reinforcement to be easier and less conflictual in more supranational contexts, because such systems at least have some form of norm reinforcing mechanisms, such as an advanced system of law. Yet, because the polity of the EU is simultaneously an intergovernmental *and* a supranational polity, a battle over norms remains a distinct possibility here too.

We set out to demonstrate three claims. First, the current literature on the role of norms in international cooperation pays insufficient attention to the possibility that norms are adopted because they mean different things to different actors and that, in consequence, compliance with a norm is partly a product of the recurrence of policy differences already existing before the adoption of the norm. Actors may make strategic use of such a situation. Second, this negligence can be remedied by fusing contemporary notions of

norms diffusion with the traditional tools of international regime theory. The wider concept of 'regime' allows for identifying degrees of norms compliance and tracking changes therein. Third, even in highly institutionalized environments such as the EU, the adoption of and compliance with norms rests with the strategic behaviour of actors. This is explained by the character of the EU, which is simultaneously an inter-state system and a 'domestic-like' polity. This goes against the intuitively plausible hypothesis that states can control the creation of norms only with increased difficulty, the denser and more complex the international legal system becomes in which they are operating (Hurrell, 2002: 146). The Janus-faced like character of the EU, however, enables actors to engage in a battle to 'redefine' previously agreed upon norms.

A consequence of these claims would be that intergovernmentalist and multi-level governance approaches to the EU are better reconceived and reformulated as approaches that recognize that the EU consists of a functionally linked and hierarchically ordered set of international regimes. For this reason, we argue that old-fashioned regime theory is well equipped for dealing with the issue of norms battle. We illustrate this by analysing the role of subsidiarity in what we will call the imperfect competence regime of the EU.

The article is structured as follows. In the following section, we demonstrate that IR approaches to the role of norms in international relations neglect the issues of norm vagueness and elusiveness and of battles over existing norms. Next, we argue that regime theory enables us to remedy this shortcoming without compromising valuable insights from rationalist and constructivist approaches to international norms. We subsequently illustrate this claim by describing and analysing in regime-theoretical terms the role and history of subsidiarity as a norm in the European competence regime between 1990 and 2005. We end with a conclusion.

What International Norms Theory Neglects

Despite the attention IR theory has paid to the role of international norms over the past 20 years or so, it has neglected one important phenomenon, namely the possibility that the adoption of international norms does not produce clear-cut compliance or disobedience, but rather ushers in a new phase of battle over the norm itself. Those IR theories that consider norms to be relevant usually argue that norms either affect actors' strategic calculations or are highly consequential for actors' preferences and even identities. Nevertheless, they assume that the norm is clear, and once established, is the object for determining its effect. We argue that established norms are themselves subject to renewed battles.

Only a few diehard realists (e.g. Mearsheimer, 1994–1995) still argue that international norms simply reflect the distribution of power and have no

effect of their own (cf. Krasner, 1983b: 5–7). Currently, most theories of International Relations consider international norms to be relevant in accounting for the behaviour of international actors. These theories have their roots in at least four theoretical bodies, the so-called English school of international relations (Bull, 1977; Dunne, 1998), transnationalism (Keohane and Nye, 1972; Risse-Kappen, 1995), international regime theory (Krasner, 1983a, 1983b), and, more recently, social constructivism (Klotz, 1995; Finnemore, 2003). These approaches differ in one important respect, that is, the mechanism of norms, or the precise manner in which norms are relevant. Two positions are usually taken. The first position considers norms to have an impact because they affect the strategic calculations of actors, often states or their governments. Actors know that their present behaviour regarding observing or disregarding an international norm will affect how other actors will judge their likely behaviour in the future. Establishing or maintaining a good reputation usually helps to further an actor's long-term interest. This mechanism operates more strongly if the international system that actors are operating in is denser and more complex (Hurrell, 2002: 146). Actors are thus prepared to forgo possible short-term advantages of disregarding international norms in order to promote their long-term reputation. Very often these theories adopt the notion of the state as the central, unitary actor in international relations. This position is taken by the modified structuralists in regime theory (Krasner, 1983a: 6–8) and even by some structural realists (Buzan et al., 1993). Transnationalists depart from the notion of the unitary state and argue that international norms may have an effect because transnational or domestic non-state actors put pressure on governments to comply with international norms. Nevertheless, affecting reputation, albeit no longer exclusively vis-à-vis other states, but also vis-à-vis domestic constituents, is the main game being played (e.g. Keck and Sikkink, 1998).

The second position considers international norms to have an impact because of their mutually constitutive nature: interacting actors construct norms; norms guide the actors' behaviour; and norms may change the definition of the actors' preferences and even identity. This position is commonest among constructivist authors (e.g. Ruggie, 1998), but was already anticipated in the studies of international regime scholars such as Donald Puchala and Oran Young (cf. Krasner, 1983b: 362–4). While rationalist scholars usually take interests as given, constructivists stress that norms can be constitutive because they may create or define interests (Wendt, 1999: 165–6). The constitutive effect of norms is felt in two major ways. On the one hand, actors may internalize international norms and accept them as intrinsically worth striving for, rather than considering them useful in purchasing basic, unchanging, long-term interests. This perspective has recently invited a closer inspection of mechanisms that help further the internalization of international norms, hence

the current interest in phenomena such as learning and socialization (e.g. Checkel, 2001; Risse and Sikkink, 1999). On the other hand, the constitutive effect of norms may also be felt through the empowering of actors that had previously been inconsequential. The adoption of international norms may, advertently or inadvertently, legitimize the participation of such actors. These actors may subsequently affect the preferences of the regular actors. Interestingly, through the notion of empowerment constructivist scholars (good examples being Klotz [1995] and Finnemore [1996]) come close to the transnationalist perspective that presents norms as strategic instruments for transnational and domestic actors to put pressure on the state.

All in all, both rationalists and constructivists have identified several, sometimes similar, mechanisms through which international norms can be consequential for the behaviour of actors in world politics (cf. O'Neill et al., 2004: 161–3). These notions have produced interesting and important empirical results which defy the hardliners' notion that international norms do not matter. Nevertheless, two related matters have been neglected by theorists of international norms that hinder empirical analyses: first, many scholars empirically focus on norms that are clear and have obvious consequences and tend to neglect norms that are vague and elusive (cf. Legro, 1997: 34); second, many scholars assume that a norm, once adopted, is either simply obeyed or disregarded (Finnemore and Sikkink, 1998: 906–8), whereas it may well be the case that a norm is subject to a constant battle over its meaning. This is all the more curious because constructivists in particular should be open to the possibility that norms are open to 'social reconstruction'. In fact, this is the claim of Wendt and Friedheim in the case of sovereignty. Sovereignty can never be taken for granted. Rather, it is constantly constructed and reconstructed through the interaction between agents and between agents and structure (Wendt and Friedheim, 1995: 247–52; see also Aalberts, 2004).

Norms May be Vague and Elusive

It has been observed that norms should be considered as 'continuous entities' (Finnemore and Sikkink, 1998: 892), that is, a norm may have been formulated more or less precisely. What often remains particularly vague is what Finnemore and Sikkink call the 'oughtness' of a norm (1998: 891), or the stipulation of what kind of behaviour is appropriate or inappropriate. This is not that surprising in international politics. State and non-state actors in world politics are more likely to adopt vague norms for several reasons. Vague norms allow actors to stick to their own interpretation of norms. It thus becomes more difficult to determine what type of behaviour would constitute a breach of the norm. Vague norms also make it possible to maximize the number of actors agreeing to the norm. This striving for consensus has long

been the hallmark of multilateral diplomacy. Scholars interested in the impact of international norms should be on the outlook for their extent of precision.

Norms May be Subject to Renewed Battles over their Meaning

Because norms in international politics have a tendency to be imprecise, a new battle over meaning can be expected once an international norm has been adopted. Norm practice reveals to the actors involved what affected parties actually intend the norm to mean. For some it may be adequate, for others the norm may be either too far-reaching or too limited. In general, however, we hypothesize that the vaguer an international norm is, the more likely it is that a new clash over its precise meaning will surface. It is important to realize that this new battle will then be different from before. The international norm adopted may have empowered new actors that will thus be legitimate participants in the new conflict over meaning. Similarly, the international norm may have redefined the interests or identities of some of the actors involved. Likewise, international norms may have altered the strategic calculations of others. In sum, the new norm dispute will be a different game because there are new actors, changed preferences, and altered calculations. The meaning of the norm may then further advance (sharpen) or may reverse (become even vaguer).

Part of this issue has been touched upon in Finnemore and Sikkink's 'norm life cycle theory' (Finnemore and Sikkink, 1998: 895–909). What we have called above the 'new battle over meaning' reinforces their point that a norm change depends on a tipping point, when during the emergence of an international norm enough state actors adapt to the new norm. This ushers in a new phase of 'norm cascade' in which the new norm spreads rapidly. Finnemore and Sikkink's framework, however, is directed at accounting for the eventual internalization of norms. Their three-stage model allows for arguing that a norm emerges, or has been widely adopted, or has been internalized. Nevertheless, it thus always speaks of the same norm. It does not take into account the possibility that, along the way, the meaning of the norm is subject to change, and might even be subject to restoration of the situation before the adoption of the norm.

It is thus important to be constantly aware of the relative precision of norms and of the possibility that the meaning of a norm is subject to conflict. We argue that the old concept of international regimes may help us tackle these issues.

How to Remedy the Shortcoming: Bringing Regime Theory Back in

International regime theory has lost popularity for various reasons: first, as a catchy tune it has been replaced with the term governance; second, it had

been criticized for its American bias; third and most importantly, since in the course of time most regime analyses were conducted only from a rationalist, state-centred perspective, regime theory's more general analytical usefulness and applicability were underestimated and in the end neglected. Nevertheless, in its original conception international regime theory constituted a framework that included non-state actors and anticipated many of the later constructivist claims on preference formation, the role of arguments, and the impact of so-called epistemic communities (cf. Hasenclever et al., 1996: 205–17). Also, norms were an important element of original international regime theory. In fact, norms are part of the famous definition of international regimes formulated by Stephen Krasner:

... implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, or rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice. (Krasner, 1983a: 2)

Empirical research into the role of international norms could benefit from describing developments in terms of an old-fashioned international regime. Because norms are embedded in a system of principles and rules it may help to determine the relative precision of international norms. It thus becomes possible to be aware of changes in the meaning of the norm and therefore of battles over its meaning. Taking account of the changes in decision-making procedures may point us to newly empowered actors, allowing for studying the interrelationship between the meaning of a norm, the rise of new actors, a renewed battle for the meaning of a norm and its outcome. In doing so, elements of both rationalist and constructivist accounts of actors' behaviour remain valuable. A norm, vague as it may be, may redefine the preference of some actors (constructivist argument); it may also empower new actors (both a rationalist and a constructivist argument), and thus change the nature of the conflict over the norm's meaning because the power distribution has changed, because actors change their strategic calculations (rationalist arguments) or because weighty actors have internalized a norm and altered their preferences or their identity (constructivist arguments). The challenge will be to specify the conditions under which these various factors are likely to carry more weight.

To determine such conditions, we analyse the role and history of subsidiarity in the EU competence regime. The literature on international norms namely argues that states tend to lose control over norms when the international legal system in which they are functioning becomes denser and more complex (Hurrell, 2002: 146; cf. the literature on legalization in Goldstein et al., 2000). The EU is usually presented as the densest and most complex international legal

system in which sovereign states are currently operating. Policies adopted by the EU tend to be of a highly legalized nature. Its precise legalized nature promotes the empowerment of all kinds of non-state actors, ranging from individual European citizens and private organizations to European civil servants and national and European judges. Moreover, the EU constitutes a highly dense system of institutional arrangements where member states constantly have to deal with one another. We would expect international (i.e. European) norms to have the greatest degree of precision and smallest degree of change in the context of the EU. As states delegate power to European institutions, in particular European law, they can be expected to see their capacity reduced to engage in a battle over the contents of the norms. The supranational character of the European legal system should resemble a hierarchical environment in which at some point the ECJ intervenes in the battle and determines the content of the norm, similar to the practice in domestic contexts. Therefore, methodologically, the subsidiarity case can be considered a 'least likely case' (Eckstein, 1975: 118–19): if we find a battle over the content of the norm even within the highly legalized EU, then such battles can be expected to be even more frequent in the less institutionalized environment of traditional international relations. The next section describes the emergence and evolution of subsidiarity in the EU in terms of what we will call an imperfect competence regime in which the regimes covering all policy areas are nested. The regime analysis follows afterwards.

Subsidiarity and the Imperfect Competence Regime in the European Union

A full appreciation of subsidiarity in the European Union is obtained when we sketch its role and history as a *norm* in the competence regime: the specific arrangement of norms, principles, rules and decision-making procedures that govern the allocation of competences among actors. In short, the competence regime defines who is authorized to act in what policy field and which decision rule applies. Note that as a consequence of our application of regime theory, subsidiarity (and proportionality) constitute the *norm* of the regime. This may be confusing because the common reference in European documents (such as the Treaties) is to subsidiarity as a *principle*. In order to avoid this confusion, we always add quotation marks when we refer to the EU usage of the term 'principle'.

The History of Subsidiarity in the European Union

Since the Maastricht Treaty, subsidiarity in the EU has essentially operated as an ambiguous norm, primarily offering a standard of behaviour for legitimate

legislative action. It stipulates that the European Community (Union) can only justifiably legislate and pursue policies in areas that fall exclusively within its competence, if the member states are incapable of acting adequately on their own or if the scale and effects are such that the Community (Union) can achieve the objectives more effectively (Treaty on European Union, Article 3b. Treaty of Amsterdam, Article 5).

Subsidiarity must not be viewed as a legal or even constitutional way to pin down once and for all the distribution of authority among the European and national institutions. In fact, that would accord it the quasi-federalist status that it was meant to *avoid* at its introduction. In 1992 there was widespread apprehension and dissatisfaction among political leaders that the Single European Act and its institutional innovations had led to an unsolicited empowerment of the Commission and a corresponding unwelcome loss of authority of the member states. Several proposals at Maastricht, such as the extension of qualified majority voting and Economic and Monetary Union (EMU) headed by a supranational European Central Bank (ECB), seemed to instigate a further expansion of power of the Community's institutions. A 'federalist' solution to the threat of further power expansion of the Community would not have been feasible as agreement to a 'catalogue of Community competences' among the 12 governments present at Maastricht would not have been possible. Subsidiarity, then, became a means to curb the tendency of expansionary Community power (Goucha Soares, 1998: 139) and represented a 'subsidiarity backlash' (Pollack, 2000) against the growth of centralization and subnational regions.

The introduction of subsidiarity may have revealed a common political *purpose* for the leaders of the member states, but it did not represent in any sense a common meaning. In fact, the success and rapid adoption of the subsidiarity norm at Maastricht can be explained by the ambiguity of the implied rights and obligations and by the fact that the member states' leaders held positive yet widely diverging interpretations of the meaning of subsidiarity. The apparent and — at the time — politically convenient yet superficial consensus tended to obscure the diverse definitions that the subsidiarity norm in reality obtained. Agreement was further facilitated by the fact that subsidiarity did not prescribe in any rigid sense the rights and obligations of EU institutions and the member states or the distribution of competences, but did promise to open up opportunities for member states to roll back the Commission's supranational zeal in particular (Van Kersbergen and Verbeek, 2004).

Subsidiarity was deliberately formulated as an ambiguous concept. The 'Protocol on the Principle of Subsidiarity' (part of the 1997 Treaty of Amsterdam) included the following telling formulation: 'subsidiarity is a *dynamic* concept and the appropriate level for action *may vary* according to circumstances' (<http://europa.eu.int/scadplus/leg/en/lvb/a27000.htm>;

italics added; accessed 20 June 2005). Because the allocation of competences remained indefinite, the precise practical functioning of subsidiarity naturally became a matter of political struggle. In fact, the Protocol neatly summarizes the tension between the member states' interest and the Commission's interest in two explicitly formulated aspects of subsidiarity:

1. 'consistent with the proper achievement of the objective, the form of Community action should not be too restrictive (as far as possible, directives should be preferred to regulations);
2. subsidiarity should not undermine the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.' (<http://europa.eu.int/scadplus/leg/en/lvb/a27000.htm>; accessed 20 June 2005)

Because of its vague and elusive formulation, member states were likely to invoke subsidiarity as an instrument to protect national interests. The Commission was equally likely to mobilize subsidiarity for further integrative policies at the European level. In the 1990s the member states effectively managed to narrow its interpretation in such a 'soft' way that they were capable of checking the Commission's mandate and its room for manoeuvre. The member states reframed and reinterpreted subsidiarity so as to be able to subject authority issues to intergovernmental evaluation. The alternative would have been a stricter interpretation of subsidiarity as a 'competence catalogue' on the basis of which the ECJ would have been asked to monitor and adjudicate the application of subsidiarity in line with the Commission's preferences. It is true that the Commission retained potential leverage over national governments because of its technical expertise for evaluation (Toulemonde, 1996). Nevertheless, this did not diminish the Commission's expectation that subsidiarity would challenge the exercise of its right of legislative initiative and would accord the member states a 'latent veto right' (Yataganas, 1996: 1106).

Still, the Commission's policy-making activities were perceived as further increasing. As a consequence, the institutional provisions agreed upon in Edinburgh (1992) and Amsterdam (1997) obliged the Commission to prove that it acts in accordance with the demands of subsidiarity. The Commission tested existing legislation against the subsidiarity requirements and consequently returned competence to the member states in several policy areas, for example in environmental policies. The Commission revised legislation in the fields of water and air (bathing water and drinking water directives). It also substituted its proposal for a directive on zoos with a recommendation instead. In such cases, 'the Commission sought to assure that ... the application of the principle of subsidiarity did not lead to any lowering of existing standards whilst leaving responsibility for implementation to the member

states' (<http://europa.eu.int/comm/environment/env-act5/chapt5.htm>; accessed 9 February 2006; cf. de Búrca, 1998).

In general, the Commission's need to justify law-making activities increased substantially, as for instance the yearly proportionality and subsidiarity report for the Council of Ministers and the European Parliament indicates. Moreover, since 1997 the Commission has had to demonstrate that a proposed EU activity passes three tests by attaching answers to the following questions to its draft legislation, the so-called subsidiarity sheet:

- 'does the action have transnational aspects that cannot be satisfactorily regulated by the Member States?
- would action by Member States or lack of action conflict with the requirements of the Treaty?
- would action at Community level produce clear benefits?' (<http://europa.eu.int/scadplus/leg/en/lvb/a27000.htm>; accessed 20 June 2005)

In sum, subsidiarity served diverging and even conflicting interests that left undecided how the power distribution between European institutions and member states would evolve. By the late 1990s it had become clear that member states had used subsidiarity to reinforce their position.

The Open Method of Coordination

In the late 1990s the Open Method of Coordination (OMC) radicalized the anti-Commission interpretation of subsidiarity within the EU (Hodson and Maher, 2001: 728). The OMC was introduced to deal with the pressure to harmonize socioeconomic policy spurred by the introduction of EMU. It is a procedure aimed at sounding out what type of problems and policy measures member states have in common, particularly in policy areas outside the first pillar. The idea is that so-called peer pressure will persuade member states eventually to harmonize their policies. Initially, the Commission welcomed the OMC as an instrument of 'Europeanizing' policy areas such as unemployment policy, the prerogative for which traditionally rested with the member states. The crux of the matter is, however, that the initiative lies with the Council and not with the Commission. Moreover, OMC policies are supposed to be directed at national rather than European solutions. It operates through recommendations rather than directives or regulations. For these reasons we interpret the OMC as weakening the Commission's position. One might add that it also weakened the position of the regions, which had tried to increase their position within the EU on the basis of subsidiarity through the European Committee of the Regions (ECR). At the same time, subsidiarity has helped strengthen the position of certain regions vis-à-vis their central governments

(especially in Belgium, Great Britain, Germany, Austria, and Spain) (Keating and Hooghe, 1996).

At the same time, the Commission struggled to retain existing or acquire new discretion. Generally, the Commission has been successful in defending accumulated competences as it is simply difficult to reduce the EU's responsibilities in policy areas where the community action has become accepted and thus has become part of the *acquis communautaire* (Jordan, 2000). The Commission also managed to acquire authority in the area of social policy, which the member states are reluctant to Europeanize and over which other actors (such as unions and employers' organisations) remain divided (Keller and Sörries, 1998).

In general, then, while subsidiarity in the 1990s increased the room for manoeuvre for member states, the introduction of the OMC boosted this advance. The Commission now emphasizes the need to improve the drafting of directives in such a fashion that implementation at the member state level is guaranteed as well as the necessity to employ alternative instruments to directives and regulations (European Commission, COM(2003)final, 12 December 2003, http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0770en01.pdf; accessed 9 February 2006). This contributes to member states retaining ample policy freedom. In addition, despite the fact that between 1992 and 2001 most EU policy areas witnessed further centralization of authority to the Community/Union level (Pollack, 2000), fewer new policy initiatives have been taken and most new legislation could be characterized as an elaboration of existing policies, especially in the area of environmental policies.

The European Convention

The European Convention extensively discussed the role of subsidiarity in a new institutional arrangement of the EU and in the context of improving the democratic quality of the EU. Significantly, the convention's Working Group I dealt exclusively with the matter of subsidiarity. The Working Group's final report (CONV 286/02, 23 September 2002; all documents taken from <http://european-convention.eu.int>; accessed 20 June 2005). One interesting aspect was that the Working Group proposed to strengthen the role of national parliaments after having established that a separate ad hoc EU institution monitoring the subsidiarity rule would make decision-making more cumbersome and lengthier. Critically, the Working Group explicitly acknowledged that

... subsidiarity was of an essentially political nature, implementation of which involved a considerable margin of discretion for the institutions (considering whether shared objectives could 'better' be achieved at European level or at another level), monitoring of compliance ... should be of an essentially political

nature and take place before the entry into force of the act in question ... (CONV 286/02, 23 September 2002: 2)

The Working Group reached consensus that the *ex post* judicial review carried out by the ECJ concerning compliance with the demands of subsidiarity needed to be reinforced.

To take account of its primarily political nature, it was important to link the possibility of appealing to the Court with the use of the early warning system Recourse to judicial proceedings must be able to occur only in limited and probably exceptional cases, when the political phase has been exhausted without any satisfactory solution being found by the national parliament(s) involved. (CONV 286/02, 23 September 2002: 7)

National parliaments, on condition that they have made use of the early warning round, were advised to be granted the right to refer cases of subsidiarity infringement to the ECJ.

The draft Constitution for Europe defined subsidiarity, together with the 'principles' of conferral and proportionality, as a fundamental constitutional 'principle'. Under Title III (Union Competences), Article I-9 (Fundamental Principles), the draft Treaty specifies the following:

1. 'The limits of the Union's competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3' (The European Convention, CONV 850/03, 18 July 2003: 9–10).

The members of Working Group I understood quite well that subsidiarity was 'a principle of an essentially political nature' (The European Convention, CONV 286/02, 23 September 2002: 2). The aim was to reformulate and reinforce the norm in the text of the draft Constitution. We have already noted the entirely new and radical mechanism of involving the national parliaments in EU law-making, a proposal that was inserted in the draft constitution. The Protocol on the application of subsidiarity and proportionality in the draft Constitution specifies a much more stringent procedure that seems to serve two purposes. On the one hand, it is an attempt to boost the democratic performance of the EU by including national parliaments structurally in the EU's institutional arrangements. On the other hand, it can be seen as an attempt to minimize further the chance that the Commission proposes legislation that does not comply with subsidiarity. Legislative proposals are sent to the national parliaments at the same time as to the EU legislator. The parliaments, which can consult regional parliaments with legislative power, can formulate 'reasoned opinions' on non-compliance with subsidiarity, of which the European Parliament, the Commission and the Council 'shall take account'. Article 6 of the Protocol spells out the following:

Where reasoned opinions on a Commission proposal's non-compliance with the principle of subsidiarity represent at least one third of all votes allocated to the Member States' national Parliaments and their chambers, the Commission shall review its proposal. This shall be at least a quarter in the case of a Commission proposal or an initiative emanating from a group of Members States under the provision of Article III-160 of the Constitution on the area of freedom, security and justice.

In the draft treaty an early warning system was adopted, allowing national parliaments to check the policy activities of the EU. In this way, subsidiarity was foreseen to reinforce the position of domestic political actors in European policy-making. The Dutch and the French 'no's' to the Constitutional Treaty in the spring of 2005 seem to have blocked the new subsidiarity norm. Failure of ratification is expected to produce institutional deadlock. Some now argue that, because of this, the early warning system should be adopted anyway in order to lessen the democratic deficit, improve the working of the EU, and thus accord the EU enhanced legitimacy.

The Early Warning System is one element of the Constitutional Treaty that was almost universally popular, and it will surely be included in the next round of treaty amendments, whenever that might be. In the meantime, as the EU faces a period of uncertainty, it should be implemented immediately. It could at least give voters a glimpse into the machinery of European politics, and they might discover that the EU is a more reasonable and responsive institution than they had thought. (Cooper, 2005)

All in all, the debate in the European Convention resulted in the proposal of an even more radically national definition of subsidiarity. Looking at the role and history of subsidiarity in the EU between 1990 and 2005, we conclude that its precise meaning has changed over time. It has also structured the relations between the European institutions and the member states to the advantage of the latter.

A Regime Analysis

Regime theory allows for the analytical distinction between principles, norms, rules and decision-making that constitutes a richer picture of an international norm than current IR theory would allow. It permits us to show that norms are adopted because they mean different things to different actors (hence the frequent vagueness of norms); that there are different degrees of norm compliance and changes therein over time; that compliance with norms rests with institution-dependent strategic behaviour of actors. The role and history of subsidiarity should be interpreted as the development of a vague and elusive norm functioning in the imperfect EU competence regime. Table 1 summarizes our findings regarding the role and history of the EU in regime-theoretical terms.

We define the EU competence regime as imperfect because its principle at first remained implicitly clear and its norm is still explicitly vague and elusive. Subsidiarity, of course, is not the only defining component of the EU competence regime. Rather, the underlying *principle* that is supposed to embody the norm is the safeguarding of national sovereignty. In regime-theoretical terms, sovereignty, although it long remained implicit, is the principle guiding the regime. Admittedly, this may seem rather odd in the context of a political system that has so many supranational characteristics. The implicit character of the principle of sovereignty between 1991 and 2002 was not that surprising as subsidiarity was explicitly introduced and implemented in order to avoid an unsolvable debate over federalism and a ‘competence catalogue’ that would have raised the sovereignty issue. Sovereignty has become a more explicit principle now, because of the discussion that emerged over the nature of the Constitutional Treaty, sparking fears that it would threaten national sovereignty. This resulted in the introduction of the notion of ‘conferral’ in the Draft Constitutional Treaty, which emphasizes that all authority originates within the member states (and can thus be taken back). In fact, the notion of a Constitutional Treaty rather than a Constitution and the introduction in the treaty text of an official exit route out of the EU render the sovereignty principle of the regime more manifest. Sovereignty is not often mentioned as the main organizing principle of the European Union because the EU is assumed to transcend the barriers sovereignty raises

Table 1
The Imperfect EU Competence Regime 1991–2005

	1991–1997 Maastricht/ Edinburgh Summits	1997–2002 Amsterdam/ OMC	2002– European Convention
Principle	Silent national sovereignty	Silent national sovereignty	Explicit national sovereignty
Norm	Vague & elusive subsidiarity	Vague & elusive subsidiarity	Vague & elusive subsidiarity
Rule	Commission reinterprets existing legislation	Subsidiarity test	Early warning system
Meta decision- making on rules regarding subsidiarity	European Council/ unanimity	European Council/ unanimity	European Council/ unanimity; Constitutional court?
Operational decision-making	No ECJ; Council of Ministers	National bureaucracies; Council of Ministers; little ECJ	National parliaments; Council of Ministers; most likely more ECJ

against solving common problems. Because the *norm* had to remain consistent with the principle of sovereignty and at the same time with the idea of common problem-solving, subsidiarity could only have a vague and elusive, but therefore also flexible, meaning.

The *rule* supporting the regime was first embodied in an assignment of the Commission to reinterpret existing legislation and evaluate past policies in the light of subsidiarity. With the Treaty of Amsterdam more pressure was put on the Commission with the introduction of the subsidiarity sheet: the Commission had to demonstrate that policy-making at the European level is warranted. The Constitutional Treaty has added another break, the early warning system, by stipulating that the Commission should review a legislative proposal if at least 40% of the parliaments of the member states do not accept that a legislative initiative should lie at the Union level.

The *meta decision-making-procedures* for changing the regime as a whole (including the decision-making procedures themselves) are consistent with sovereignty: decisions on changes in the regime are taken by the member states on the basis of unanimity. *Operational decision-making procedures* within the

regime ('prevailing practices for making and implementing collective choice'; Krasner, 1983a: 2) are subject to a variety of decision rules (including qualified majority voting). The ECJ was reluctant to become involved in competence conflicts in the absence of a constitutional court. In the aftermath of the Treaty of Amsterdam, major innovations, such as the OMC, tended to reinforce national sovereignty. The introduction of the subsidiarity sheet put the locus of 'checking the Commission' at the level of national departments as they receive first legislative drafts from Brussels. In this period the ECJ was an almost absent player. The European Convention proposed the possibility of wider checks by national parliaments. It would thus reinforce the national leverage over Brussels. The ECJ would acquire a greater say in subsidiarity disputes, as the Constitutional Treaty specifies the following:

The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it. (CONV 850/03, 18 July 2003: 231)

We can conclude that the regime's principle expresses a specific interpretation of state sovereignty, which remained unaltered over time, although it has become more explicit in the Convention. Subsidiarity remained the vague and elusive norm that it always has been. The development of the rules, however, suggests that the regime has become stricter and is increasingly offering possibilities for domestic actors to intervene (bureaucracies, national parliaments). The meta-decision rules have not changed fundamentally. Nevertheless, if a constitution were adopted in the future, the ECJ may assume the role of a constitutional court.

This description of the characteristics and changes over time of the EU competence regime is of course not sufficient if one wants to assess the impact of international norms. Has subsidiarity changed preferences and empowered new actors and has it thus in its implementation changed the nature of the regime? When subsidiarity was adopted as a norm at the 1991 Maastricht summit, several actors could be expected to profit. This was particularly true because of the elusiveness of the concept of subsidiarity. Subnational actors could be expected to seize subsidiarity as an instrument to advance their claim vis-à-vis their national governments. The ECJ could have displayed judicial activism and could have sought the role of umpire over conflicts over competences. The Commission could have tried to advance its room for manoeuvre by appealing to an interpretation of subsidiarity as enhancing the options of the supranational European institutions. National governments could have opted for an interpretation of subsidiarity that would curb the Commission's activism. What we have witnessed empirically between 1991 and 2004 is that

subsidiarity has mainly benefited national governments, and at some distance, certain regions. Since 1997, the stricter definition of the regime's rules and operational decision-making procedures have strengthened the position of actors within the member states, in particular bureaucracies and, possibly, national parliaments. Although the vagueness of the norm has changed power relations within the EU by empowering new actors such as the regions and reinforcing the power of traditional actors, its very elusiveness was bound to raise new conflicts over the precise meaning of the norm and over how to deduce from it specific rules and operational decision-making procedures. Therefore, we still have to look at the power struggle between salient actors within the EU in order to account for their specific contents, and thus for the nature of the regime as a whole and the policies formulated within the regime. Sovereignty as a principle constitutes the top of the regime's hierarchical structure. Subsidiarity as a norm comes next.

Given that sovereignty still plays such a crucial role in the EU competence regime, one might, with Krasner, wonder whether the competence regime constitutes a form of organized hypocrisy. Organized hypocrisy refers to a situation on which 'institutional norms ... are enduring but frequently ignored' (Krasner, 1999: 66). Krasner makes a distinction between two types of sovereignty. One deals with issues of the authority of the state to exclude third actors and the recognition of the state to engage in international agreement. Another type deals with issues of control, including policy autonomy. Organized hypocrisy is a characteristic of the first type. In the case of the EU competence regime, however, the principle of sovereignty is both enduring and observed. In the light of the recent attempt to explicate the principle in the draft Constitutional Treaty ('the principle of conferral'), sovereignty in highly institutionalized forms of cooperation is much more stable, and thus less hypocritical. However, this does not hold for subsidiarity. In fact, this norm is explicitly meant to be ambiguous and elusive and therefore can be referred to as a form of intended hypocrisy in the sense that Krasner implied.

Conclusion

The main conclusion that can be drawn from this article is that international norms, once adopted, are not easy to live with, not even in highly legalized settings such as the EU. On the contrary, the very acceptance of an international norm may just be the start of a fierce battle to define its precise meaning, which can lead to a reformulation of such norms. This possibility is usually neglected by mainstream approaches to analysing international norms: they tend to neglect the process leading from norm adoption to norm internalization. Those who do take that phase into account have a tendency to focus exclusively on successful socialization and internalization and

disregard the possibility of political battle resulting in norm reformulation. We have shown that applying the analytical framework of international regime theory — in our case to the imperfect competence regime of the EU — enables scholars to track these battles for norms during the implementation phase much better. The empowerment of new actors, such as the European Committee for the Regions and subnational actors, and the potential reinforcement of the position of old ‘supranational’ actors, such as the Commission and the ECJ, forced member states to reengage in a battle over the precise meaning of the subsidiarity norm and to introduce new norms such as the OMC. Rather than the internalization of a clear norm through persuasion, we witnessed a battle of competences which resulted in norm reformulations, buttressing the principle underneath: sovereignty. The analytical tools of international regime theory enabled us to make these distinctions and track changes in their contents.

One major issue raised by our analysis is the question whether certain international norms are more likely than others to be prone to ignite battles comparable to the one that raged over subsidiarity. Our analysis suggests that such battles are more likely to occur if the international norms adopted in their application are expected to affect the power relations between the major actors involved. In the case presented above — the battle over subsidiarity — this involved the power relations between the member states on the one hand and the Commission and subnational actors on the other.

Can our analytical model be applied to other cases, both in the EU and in more intergovernmental settings? We think that this is the case. Within the EU, the conflict generated by the criteria for EMU membership reveals, at face value, a pattern comparable to the subsidiarity battle. The formulation of these criteria at Maastricht in 1991 proved the spark of a political battle once EMU became effective in 1999. The formulation of the Stability and Growth Pact was necessary to ensure support from the smaller member states (and Italy!) that larger member states’ disobedience of the EMU criteria would be ruled out. The formulation of the explicit possibility to punish states failing to meet EMU standards seemed a clear rule deduced from the EMU norms, which themselves were derived from the principle that monetary stability was the overall value. The constellation of the Stability and Growth Pact seemed to empower the European Commission and the European Central Bank with the support of the smaller EU member states. When push came to shove, however, smaller member states were punished for not adhering to the EMU criteria, while the larger failing EMU members escaped punishment.

In more traditional, intergovernmental settings, conflicts over the precise meaning of norms regularly occur. This is understandable as international agreements usually prescribe annual or biannual meetings of adhering partners. At such meetings international organizations often produce reports on

the degree of implementation of the agreement. Such meetings offer the opportunity for actors who are disappointed with the agreement to try and change the precise contents of norms. One example is the case of women's reproductive rights and health. The 1995 Fifth World Conference on Women in Beijing provided an opportunity for conservative actors, such as the Vatican and Islamic states, as well as radical actors, such as the Women's Environment and Development Organization (WEDO), to challenge the precise meaning of the norms on reproductive rights and health agreed upon at the International Conference on Population and Development at Cairo in 1994 (Joachim, 2003: esp. 267–8). Despite clever diplomacy, the alliance of opponents of the Cairo Consensus was unsuccessful in changing the norms.

The case of the Stability and Growth Pact is another example in which application of the norm resulted in conflict and even renegotiation of the norm. It is likely to lead to a further round in the battle over its meaning and impact with the possible outcome that some of the EMU criteria will be relaxed and the norm thus adjusted. The case of women's reproductive rights and health illustrates that even continuity in the norm is not necessarily an indication of norm acceptance, but could very well be the outcome of a battle over the norm. These and like cases underline that IR theories of norm diffusion need to pay attention to recurring battles over norms and that the concept of international regime generally allows for a better understanding of the dynamics of norm acceptance and compliance in various international settings.

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